253630

CTS CON-WAY TRANSPORTATION SERVICES
A CNF COMPANY

SCOTT J. ENGERS
Vice President
Corporate Counsel

September 2, 2003

Re: Department of Transportation
Federal Motor Carrier Safety Administration
Docket No. FMCSA-97-2277 – 66
Rin 2126-AA17
49 CFR Parts 390 and 391
Safety Performance History of New Drivers
Supplemental Notice of Proposed Rulemaking, Request for Comments

Dear Sir or Madam:

This comment is in response to the above referenced notice of proposed rule making and is made on behalf of Con-Way Transportation Services, Inc. Con-Way is a $2.1 billion transportation and services company that provides time-definite and day-definite freight delivery services and logistics for commercial and industrial businesses. It operates throughout North America, with 18,000 employees and 440 Service Centers. Con-Way has an excellent safety record and safety is one of our prime values. Our application process includes criminal background checks, contacting past employers, interviews, and road tests. It is sufficient to properly qualify drivers. There is no need for additional government regulations in this area.

Con-Way does not support the FMCSA's proposal. It will delay the hiring of drivers, increase paperwork and administration with little or no benefit. The cost assumptions made by the FMCSA are insufficient. There are many more applicants for each driver hired than assumed by the FMCSA. The FMCSA assumed a rejection rate of applicants of only 4 percent. The rejection rate is closer to 80 percent, 20 times higher than the assumed rate. If this is the case, then the FMCSA's estimated total discounted costs over a 10-year period of $76 million is incorrect. At 20 times higher, the cost would be $1.52 billion. To be conservative, let's assume a cost of at least $500 million. As the proposal calls for notice to all applicants and may result in request to previous employers along with providing the information received to applicants with the possible follow-up with corrected information, there is no doubt that the proposal will result in lots of paper and administration. Not only employers but also potential applicants will be impacted, as applicants may not be hired as quickly, creating more hardship and loss of income for job seekers.

110 PARKLAND PLAZA ANN ARBOR, MI 48103
(734) 769-0203 (734) 214-5651 FAX www.con-way.com

Likewise, the FMCSA benefit analysis is inadequate. It assumes, with no data to support the assumptions, that there may be a 0 percent, 10 percent, 25 percent or 50 percent reduction in accidents (what is identified as "deterrence effect"). The fact that there is a wide range implies that there is little supporting data to support a more definitive statement of benefits. The analysis assumes that drivers with poor accident histories will not be hired. There is nothing to support this assumption. If employers need drivers and they are in short supply, they will hire who is available. Furthermore, to the extent that drivers do leave the industry, then more inexperienced drivers will enter the industry. The analysis does not take into account the greater likelihood of inexperience driver's involvement in accidents. The analysis appears to be based solely on a study by the Volpe National Transportation Systems Center that simply compared accident ratios of motor carriers they identified as high-risk against carriers identified as low-risk. There is nothing in the analysis that supports a finding that high-risk carriers will become low-risk carriers because of this proposal. There is nothing to support the assumption that this study can be transferred to a "per driver rate" as suggested in the proposal. Even assuming a "per driver" rate can be established, there is nothing to support the assumption that there will be a reduction in the "per driver" rate as suggested in the proposal. In reading the analysis, it appears that it is built on assumptions on top of assumptions in order to conclude that the estimate of accident reduction benefits will not be overstated. It is a flawed analysis based on little data and many assumptions.

But even assuming that the benefit analysis is accurate, the highest assumed 50 percent deterrence effect only estimates a savings of $132 million over a 10-year period. As stated above, using a more realistic applicant rejection rate of 80 percent, the cost is at least $500 million dollars. This proposal is not justified.

Other than not being cost justified, there are several problems with the proposal. The first is the timeframe allowed for providing information. Under the proposal, prospective employers must make inquiries with past employers regarding the accident history of applicants. The past employer has 30 days to respond. This is too long. Applicants wishing to review previous employers' information must request it and the prospective employer must provide it within 2 business days. This is too short. Applicants may correct information they believe is erroneous by sending the corrections to the previous employers. The previous employer must respond within 30 days of the receipt of corrected information from the applicant. This is too long. There is a potential of over 60 days for the carrier to wait for complete information (30 + 2 + 30). However, the prospective employer must complete the investigation within 30 days of the date the driver's employment begins. The proposal apparently anticipates that carriers will hire drivers before their investigation is completed but must anticipate when they will obtain all the information in order not to go beyond the 30-day limit. Neither the carrier nor the applicant can wait 60 plus days. Con-Way, and I believe most carriers, would not want to hire someone until the investigation is complete. Hiring a driver and then terminating his employment after receiving information from previous employers is not an acceptable practice. The likely result is that applicants whose previous employers promptly respond and whose information is not disputed will be hired while other applicants will lose the opportunity.

Con-Way suggests a 5/5/2/5 business day structure: previous employer has five business days to respond, prospective employer has five business days to respond to applicant's request for information,

applicant must send corrections to previous employer within two business days and previous employer must respond to request for corrections within five business days. The prospective employer should not have to wait more that 17 business days to complete its investigation. This is still too long to wait. But, this may be the shortest practical time to permit the various inquires. It will be a hardship for both employers and potential employees to wait this long. The FMCSA's proposal should not go forward.

A second problem is that, although the proposal tries to protect carriers from defamation suits, its high standards may well defeat this goal. For example, it requires that previous employers must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in forwarding the records and also the previous employer must take all precautions reasonably necessary to ensure the accuracy of the records. This latter standard will become even more difficult to meet if the ATA's excellent suggestion that a determination of preventability be added to the required response from previous employers. I can see the argument now that the carrier did not make an adequate investigation to determine preventability or that the person making the determination is not qualified. This may especially be true if no citations were issued. There will likely be litigation over what is required to take "all precautions reasonably necessary." Whether one prevails in the litigation, there will be cost of defense that can be substantial. This cost is not taken into account in the cost analysis. The proposal states that, if one is not in compliance with the procedures, then one does not have the protection against defamation. This should be changed to indicate that the protections do apply unless a person knowingly and intentionally furnishes false information.

A third concern is that access to the Drivers Employment History File must be limited to those who are involved in the hiring decision or who control access to the data. This will require a separate file from the employee's personnel file, as many people will have access to a personnel file. The proposal should be amended to permit the storage of this information in personnel files.

A fourth issue is that the information obtained can only be used in the hiring decision. The use of the accident history should not be limited. An applicant with a marginal accident history should not start with a clean slate with a new employer. I can just see the litigation now that an employee is terminated after one accident and he alleges that he was terminated because the employer knew about his prior accidents with previous employers. The allegation will be that but for his accident history he would not have been terminated.

A fifth problem is that previous employer does not include current employer. If an individual is currently employed and is seeking a new position, his current employer should be required to provide the accident history.

A sixth suggestion is that third parties should be allowed to obtain information for prospective employers.

In conclusion, there is no need for this proposal as employers can sufficiently qualify applicants through background check, interviews, and road tests. There is no need for additional government regulation in this area. The cost justification of the current proposal is flawed and using a realistic rejection rate for applicants shows that the costs far outweigh the benefits. There are many specific problems with the

proposal, six of which are outlined above. If the proposal goes forward it should, at the very least, be modified as suggested above.

Sincerely,

Scott J. Engers